

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

May 3, 2007

In the Matter of
Mark Hubbard

Docket No. 2007-018
File No. 28-1766
Gloucester

RECOMMENDED FINAL DECISION

A group of residents of the City of Gloucester have appealed the Department's decision concerning a proposal to install underground utilities within an existing roadway located in the Buffer Zone to a Bordering Vegetated Wetland (BVW). The Department's Northeast Regional office dismissed the appeal for an SOC for "lack of jurisdiction and failure of the appellant to state clearly how the Order of Conditions issued by the commission is inconsistent with 310 CMR 10.00 and how it does not contribute to the protection of the interest [sic] identified in M.G.L.c. 131, §40." MassDEP cover letter, January 23, 2007. The Department's cover letter dismissing the request also addressed the issues raised in the request for an SOC. Those objections in their entirety, as set out in the request were:

1. Insufficient information. Applicant did not provide DEP required city approval of a sewer extension.
2. Failure to file with MEPA required by 310 CMR 10.07.
3. Work was planned along a contiguous extended wetland that drains into the Walker Creek A.C.E.C. If any work were to be done here, wildlife habitat studies and conditions to protect amphibian and reptile passage and bird nesting would be required.

Petitioners' Request for a Superseding Order.

This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057. TDD Service - 1-800-298-2207.

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The Department's dismissal addressed each issue as follows.

1. MassDEP under 314 CMR 7.00 issued a sewer extension permit, and the applicant is not required to provide a copy of the permit. General conditions in the Order of Conditions also include the caveat that issuance of the Order does not relieve the applicant from any requirement to obtain and comply with other permits.
2. Concerning the applicability of the Massachusetts Environmental Policy Act (MEPA) to the project, the Department concluded no Environmental Notification Form was required, and that even if an ENF was required, the Conservation Commission could issue an Order of Conditions before the ENF was filed.
3. Wildlife habitat studies under the Wildlife Habitat Protection Guidance, Appendix A or B, are not triggered for activities within the Buffer Zone.

No SOC was issued, and this appeal was filed challenging the dismissal with a restatement of the issues from the petitioners' SOC request, and requesting a remand to the MassDEP regional office issuance of an SOC. The applicant moved to dismiss the Claim for Failure to state a claim upon which relief can be granted, and alternatively for lack of standing, jurisdiction, mootness and untimeliness. The Department moved separately for dismissal, joining the applicant's motion as well.¹

A claim may be dismissed for failure to state a claim upon which relief can be granted when, after presuming all facts alleged in the notice of claim to be true, the claim does not present any grounds for relief. 310 CMR 1.01(11)(d)2. Such a motion tests the legal sufficiency of the claim, or whether the relief sought can be provided. In the Matter of Lawson, Docket No.

¹ The petitioner filed an opposition to the applicant's motion to dismiss. The opposition does not address the issues raised in the Claim, but responds to the applicant's request for sanctions and alleges intimidation on the part of the applicant. The question of sanctions is addressed below.

2000-111, Recommended Final Decision (February 2, 2001). Claims may be dismissed as legally insufficient if it appears beyond all doubt that the petitioner is entitled to no relief available. Matter of Sheridan, Trustee, Brookmeadow Development Trust, Docket No. 98-001, Ruling on Motion to Dismiss (June 2, 1998).

The petitioners' issues concerning the applicability of MEPA and insufficient information concerning local sewer connection approvals are outside the purview of the Department's permitting jurisdiction under the Wetlands Protection Act. The regional office concluded that no SOC issued under the Wetlands Protection Act could provide the relief requested. I concur and recommend their dismissal.

MEPA and Local Sewer Connection Claims.

Assuming the petitioners' factual assertions are true, and the applicant failed to file with MEPA when an ENF was required, it would not prevent issuance of an Order of Conditions, invalidate the instant Order or necessitate the issuance of an SOC. The assertion of MEPA jurisdiction does not explain how the Order is inconsistent with the Wetlands regulations, or request any relief under 310 CMR 10.00.

The provision cited by the petitioner, 310 CMR 10.07, is procedural, and provides for a stay of the permitting proceedings under certain circumstances when MEPA applies. The rule specifies that if required under MEPA, the ENF filing occur before the Department issues an SOC, and requires that the applicant be notified of the ENF requirement. No error was alleged in the Order, no substantive wetlands relief was sought, and specifically, no substantive or procedural relief was requested under 310 CMR 10.07. Because the petitioner's claim failed to

clearly identify a defect in the Order that made it inconsistent with the standards of the wetlands regulations at 310 CMR 10.00 or explain how it did not protect the interests of the Act, I find the region's dismissal appropriate.

Similarly, the assertion that the "Applicant did not provide DEP required city approval of a sewer extension" does not specify how Order of Conditions is inconsistent with the wetlands protection regulations or fails to protect the interests of the Act.

If the claim concerned the requirements for a local sewer permit or MassDEP's sewer extension permit, the wetlands SOC is not able to provide any relief with respect to those permits issued under wholly different statutory authority. The Department's dismissal pointed out that a state sewer extension permit had been issued under separate statutory authority, was not part of the wetlands protection act review under 310 CMR 10.00 and M.G.L. c.131, §40, and any local approval would be addressed by the general condition regarding other approvals in the Order of Conditions.

The claims made by the petitioning group here are in fact very similar to ones presented in Matter of Building Center Inc., Docket No. 2002-230, Recommended Final Decision (March 19, 2004) adopted by Final Decision April 8, 2004, Reconsideration Denied (June 10, 2004).² The petitioners in Building Center Inc. appealed an SOC claiming that "the project was 'not possible without a sewer extension', and that 'Gloucester has been segmenting sewer extensions in regard to MEPA requirements' and that its approval violated 310 CMR 10.07." The claims were dismissed as they did not address the specific project proposed in the Notice of Intent,

² The same authorized representative, Stevan Goldin, represented the petitioner groups in that case as he does in this matter.

requested unavailable speculative adjudication that the project could not meet local sewer requirements³, and did not assert any claim for relief under 310 CMR 10.07 with respect to MEPA compliance⁴. Because no relief could be granted in the wetlands permit appeal, the claims were dismissed.

Here too, no relief with respect to 310 CMR 10.07 was requested, and the agency cannot determine compliance with any local sewer requirement or review the terms of the issued state sewer extension permit in an SOC. The petitioner's MEPA and sewer permit claims were appropriately not considered wetlands permit issues that could be addressed in an SOC, and dismissal was appropriate.

Wildlife Habitat Evaluation

The remaining claim stated "Work was planned along a contiguous extended wetland that drains into the Walker Creek A.C.E.C" and declared "if any work were to be done here, wildlife habitat studies and conditions to protect amphibian and reptile passage and bird nesting would be required." Request for SOC. It was dismissed by the region for failure to specify how the Order was inconsistent with the Wetlands Protection Act standards. The claim does not challenge the finding in the Order of Conditions that the project is within the Buffer Zone. It also fails to

³ The local sewer permit claim's dismissal was based on lack of jurisdiction. "DEP has no authority to deny or vacate project approval under the Wetlands Protection Act or Regulations based upon its own determination that the project does not comply with local law. [citation omitted] The project's ability to comply with local sewer extension requirements cannot be adjudicated here..." Matter of Building Center Inc., Docket No. 2002-230, Recommended Final Decision (March 19, 2004).

⁴ The MEPA claim was raised yet again in Matter of Endicott College, Docket No. 2002-057, Recommended Final Decision (September 6, 2002). Because it was raised quite late in the proceedings, it was deemed untimely, and disallowed, as the Administrative Law Judge found the petitioners had a multitude of earlier opportunities to raise the question, but failed to do so. The same representative of the petitioning group, Mr. Stevan Goldin, is representing the resident group in this case.

allege any connection between the work proposed in the NOI and conditioned in the Order of Conditions and the ACEC, or the “contiguous extended wetland” or some other area protected by the Act. Instead the claim speculates that habitat studies would be required if work was planned in the ACEC. The project is located in the Buffer Zone to a BVW and no habitat evaluation is required for Buffer Zone projects. See 310 CMR 10.02 (jurisdiction over activities in the Buffer Zone) and 310 CMR 10.53(1) (narrative Buffer Zone standards). None could be required by the regional staff in order to issue an SOC.⁵

The Department’s dismissal correctly found that habitat evaluation could not be required in an SOC for work entirely within the Buffer Zone, and that the claim did not clearly state how the Order conditioning the project was inconsistent with the wetlands regulations or did not protect the interests of the Act. I recommend granting MassDEP’s Motion to Dismiss and the applicant’s Motion to Dismiss for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to 310 CMR 1.01(5)(a)15.f.v.

Sanctions

The applicant requested that sanctions be imposed on the petitioner in the form of costs. Such a sanction is not within my authority under 310 CMR 1.01(10). I therefore deny the request.

⁵ Even if the Project were located within a BVW or BLSF, an allegation not made by the petitioners, no habitat evaluation would be required by 310 CMR 10.60 (Wildlife Habitat Evaluations) as that section applies to projects in other resource areas.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion directs otherwise.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Acting Commissioner Arleen O'Donnell, May 4, 2007.